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CITATIONS

364522—55——1

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the District of Columbia is reported in 132 F. Supp. 34. The report of the Interstate Commerce Commission is reported in 289 I. C. C. 49. The court's opinion and its order dismissing the complaint are set forth in the Appendix, *infra*, pp. 21-26.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 to set aside an order of the Interstate Commerce Commission. The judgment of the district court

was entered on June 28, 1955 and notice of appeal was filed in that court on August 26, 1955. The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *United States* v. *Interstate Commerce Commission*, 337 U. S. 426; *United States* v. *Capital Transit Co.*, 325 U. S. 357; *United States* v. *Great Northern R. Co.*, 343 U. S. 562.

STATUTE INVOLVED

Sections 1 (5), 1 (6), 2, 3 (1), and 6 (8) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 (5), 1 (6), 2, 3 (1), and 6 (8), provide in pertinent part:

> § 1 (5). All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.
>
> § 1 (6). It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce * * * just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering

property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

§ 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

§ 3 (1) It shall be unlawful for any common carrier subject to the provisions of

this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person * * * or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: * * *

* * * * *

§ 6 (8). In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. * * *

QUESTION PRESENTED

Railroads serving North Atlantic ports have for many years published shipside rates on export freight, *i. e.*, rates covering line-haul service and wharfage and handling services at the piers. Where the railroads do not have their own piers they provide the latter services through terminal operators. The Government owns piers at Norfolk, Virginia, which have long been utilized by the railroads for handling a great bulk of rail-water traffic. Immediately prior to 1951, these

piers had been leased to and operated by a terminal company. In that year, because of the Korean emergency, the Government cancelled the lease and resumed control of the piers. It retained the former lessee to continue to perform wharfage and handling operations. It also permitted, to the extent consistent with military requirements, the movement of civilian freight over the piers. The railroads continued to pay for wharfage and handling services performed in connection with civilian freight moved over the piers, but refused to do so in connection with military freight. The following question is presented:

Whether the railroads' failure to perform or to pay for wharfage and handling services (for which they were compensated under the shipside rates) in connection with the movement of military freight over the Government piers, while continuing to pay for such services on commercial traffic moving over the same piers (as well as commercial traffic moving over other piers served by the railroads in the port of Norfolk), subjected the Government to unjust discrimination, constituted an unreasonable practice and departed from the carriers' obligation to facilitate military traffic, all in violation of the Interstate Commerce Act.

STATEMENT

For more than 50 years, northern railroads serving Norfolk, Virginia have provided the pier facilities ("wharfage") and handling services

necessary for interchanging freight between their cars and water carriers. Where the railroads do not have their own pier facilities, they provide these services through commercial terminal operators. This was the situation prior to World War II in Norfolk, where for many years the Army Base Piers (constructed shortly after World War I) had been leased by the Army to private terminal operators who, acting as the railroads' agents, had provided wharfage and handling. No separate charges were made in the tariffs for these services, but they were included in the line-haul export rates.[1]

As a result of the great increase in military traffic following American entry into World War II, the Army in 1942 cancelled the leases on the piers and took over their operation. It requested the railroads either to continue providing the services or to give it an appropriate allowance therefor. The railroads refused, on the ground that under the applicable tariffs their obligation to provide wharfage and handling terminated when the Army took over the piers. The Army then filed a complaint with the Interstate Commerce Commission seeking reparations from the carriers. After hearing, the Commission dismissed the complaint and the district court up-

[1] In *Charges for Wharfage, Handling, etc., at Atlantic and Gulf Ports*, 157 I. C. C. 663, the Commission at the railroads' urging held that the railroads were not required to segregate the charges for such services.

held the order,[2] but the court of appeals reversed. *United States* v. *Interstate Commerce Commission*, 198 F. 2d 958 (C. A. D. C.), certiorari denied, 344 U. S. 893.

In a lengthy opinion, the court of appeals held (p. 975) that certain of the Commission's findings lacked substantial evidentiary support, and that "certain of its legal conclusions are opposed to the 'standards established by Congress to determine when reparations are due.'" The court pointed out (pp. 964–965) that the Government sought reparations on two theories: first, that the applicable tariffs obligated the railroads to furnish wharfage and handling at the piers, and second, that "quite aside from the tariff provisions it was unduly discriminatory for the carriers to refuse either to render the services or to make an allowance in lieu of performance in connection with traffic at the Army Base piers, while at the same time rendering them at other piers at Norfolk and elsewhere in connection with similar traffic." The court held (p. 973) that the Commission's conclusion that the railroads had not unlawfully discriminated against the Government was not justified by the legal theory upon which

[2] In an earlier phase of the litigation, this Court, in upholding the right of the United States to maintain the action, held that the case should be heard by a single district judge instead of the three-judge district court which ordinarily reviews Commission orders. *United States* v. *Interstate Commerce Commission*, 337 U. S. 426.

it rested, namely, that the Army's action in taking over the piers converted them from "public" to "private" facilities, and thereby relieved the carriers from their obligation to provide wharfage and handling. The court accordingly remanded the case to the Commission for further proceedings.[3]

The piers were returned to private operation by the terminal operators after the war, but on May 1, 1951, as a result of the Korean emergency, the Army again cancelled the leases and resumed control of the piers. It retained the private terminal operator to perform wharfage and handling, and paid it for the services at the rate of approximately $75,000 per month. A substantial volume of non-military traffic continued to move over the piers, and that was handled by the terminal operator as the agent of the railroads at their expense.

Once again, the railroads refused the Army's request either to provide the services or to pay it the allowance therefor which they previously had paid the terminal operator. They gave the same reasons as during World War II, and also relied on certain changes in the applicable tariffs. The Army then filed a complaint with the Commission seeking (1) an adjudication that the carriers' re-

[3] On remand the Commission, after further hearing, again dismissed the complaint, 294 I. C. C. 207, rehearing denied September 19, 1955.

fusal to provide or pay for the services subjected it to unjust and unreasonable rates and charges in violation of Sections 1, 2, 3 and 6 of the Interstate Commerce Act, and (2) a cease-and-desist order.[4]

After hearing, the Commission dismissed the complaint. *United States* v. *Aberdeen & Rockfish Railroad Co.*, 289 I. C. C. 49. The Commission held (pp. 62–64) that the applicable tariffs obligated the railroads to provide wharfage and handling only if the terminal operator performed the services as agent of the carriers; that after May 1, 1951, the terminal operator handled military freight as agent of the Army; and that the carriers therefore were not required, or indeed authorized (p. 65), to provide these services. The Commission rejected the Army's contention that, apart from the question whether the tariffs obligated the railroads to provide wharfage and handling after the Army took over the piers, it was discriminatory and unreasonable for the railroads to refuse to pay for the services on military traffic while continuing to pay for them on private traffic. The Commission gave the same reason it had given in rejecting a similar contention in the

[4] Under 49 U. S. C. 66, the Government pays the bills of rail carriers without audit, but reserves the right to deduct any overpayments from sums subsequently due the carriers. If the carriers' failure to pay for wharfage and handling is held to have been unjustified, the General Accounting office will offset the overpayments against future bills from the carriers.

first case: that when the Army took over the piers it converted them from "public" to "private" facilities, and that it therefore was in the same position, and had been accorded the same treatment as "any other shipper that takes possession of its shipments when delivered by rail to its own private pier facilities" (p. 61).[5]

Chairman Alldredge dissented on the ground that he was "unable to discover any substantial differences" between this case and the earlier one, and that the prior court of appeals' decision required a holding that the carriers' charges were unjust and unreasonable.

In review proceedings brought by the United States, a three-judge district court, one judge dissenting, upheld the Commission's order.[6] The majority (District Judges Pine and Keech) held that the order was supported by adequate findings which, in turn, were supported by substantial evidence. The court distinguished the prior court

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[5] The Commission stated (289 I. C. C. at 63) that where the railroads provide adequate facilities for unloading, a private shipper who insists on delivery at his own pier is not entitled to wharfage and handling there, since "it is not unreasonable to refuse to extend wharfage and handling services to traffic handled over private piers when the shipper does not wish to use adequate facilities of the defendants."

[6] Since the Army's complaint before the Commission did not seek reparations, but only an adjudication that the railroads' practices were unreasonable, and a cease-and-desist order, the proceeding was brought before a three-judge court rather than before the single-judge court which reviews orders denying reparations. See *supra*, note 2.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4001–54

UNITED STATES OF AMERICA, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, DEFENDANTS

ORDER DISMISSING COMPLAINT

This cause came on for hearing on the answer of the United States, The Interstate Commerce Commission and the intervening defendants, and the Court having heard the argument of counsel and being fully advised,

IT IS ORDERED that the complaint be and it is hereby dismissed.

Dated June 28, 1955.

———— ————,
Associate Justice,
United States Court of Appeals,
for the District of Columbia Circuit.

PINE,
Associate Judge,
District Court of the United States
for the District of Columbia.

KEECH,
Associate Judge,
District Court of the United States,
for the District of Columbia.

Approved as to form:

[S] COLIN A. SMITH.

[S] SAMUEL R. HOWELL.

U. S. GOVERNMENT PRINTING OFFICE: 1955

of appeals decision on the ground that the tariffs here, "which are the sole basis of plaintiff's action, are materially different." Circuit Judge Bazelon, who had been a member of the panel which decided the earlier case, dissented on the ground that that decision was "controlling" and required reversal of the order.

THE QUESTION IS SUBSTANTIAL

The Commission's holding that it was neither discriminatory nor unreasonable for the railroads to refuse to pay for wharfage and handling on Army shipments while continuing to pay for such services on commercial shipments rested on the theory that when the Army cancelled the leases on the piers it converted them from "public" to "private" facilities, and that the railroads were obligated to provide wharfage and handling only at "public" piers. That was the same ground upon which the Commission had dismissed the Government's complaint in the first case, and which the court of appeals held was insufficient to justify the carriers' discriminatory treatment of the Government.

The rationale of the Commission's decision was that once the piers became "private" the Army was in the same position as "any other shipper that takes possession of its shipments when delivered by rail to its own private pier facilities" (289 I. C. C. at 61); and that where the railroads provide adequate facilities for unloading,

a private shipper who insists on delivery at his own pier is not entitled to wharfage and handling there, since "it is not unreasonable to refuse to extend wharfage and handling services to traffic handled over private piers when the shipper does not wish to use adequate facilities of the defendants" (p. 63). But the Commission's analogy between the Army's taking over the piers and a private shipper's insistence on delivery to its own pier is unsound. For, as the court of appeals pointed out in the first case (198 F. 2d at 972), "[t]he Government's shipment of freight over its own piers was not a matter of commercial convenience or advantage" as in the case of a private shipper, but was designed to promote the national defense interests of the United States. Indeed, the Commission's view that the Army's taking over the piers discharged the railroads' obligation to perform wharfage and handling appears to fly in the face of the railroads' affirmative duty, under Section 6 (8) of the Interstate Commerce Act, to "adopt every means within their control to facilitate and expedite the military traffic" "[i]n time of war or threatened war."

The analogy is unsound for another reason. As the court of appeals earlier pointed out (*ibid.*), the principal reason why the Commission had upheld a railroad's refusal to provide wharfage and handling at a shipper's private pier where it had its own pier available was that it would have cost the carrier more to render the service at the shipper's pier. But in the instant case

"the Government's action, taken in an emergency to assure a smooth flow of war materiel, [did not] increase the cost to the railroads or inconvenience them in any way" (198 F. 2d at 970). The railroads could have continued to provide wharfage and handling on Army freight in the same way that they had done prior to May 1, 1951, namely, by continuing to make the same payments to the terminal operator which actually performed the service. The fact that the services required on Army shipments were more extensive than those required for commercial freight would not have imposed any greater burden on the carriers, since the Army requested the carriers to pay only the amount which they previously had paid on Army freight, and which they continued to pay on commercial freight. "What the railroads seek is the retention of money which they would have been obliged to disburse to the Terminal Corporation, had the war not led the Army to assume operation of the piers." *Id.*, at 971.

We submit, moreover, that designating the piers "public" or "private" does not face up to the issue of discrimination. It neither explains nor justifies the fact that the carriers made payments for the wharfage and handling service provided for commercial traffic moved over the same piers by the same terminal operator.

The district court seriously erred in holding that the "sole basis" of the Government's com-

plaint was the tariff provisions. In both this case and in the first case, the Government contended not only that the applicable tariffs obligated the carriers either to perform the services or to pay therefor, but also that, apart from the tariffs, it was discriminatory and unreasonable for the railroads to pay for the services on commercial freight while refusing to pay for them on Army freight. And in an earlier stage of the first case this Court, in upholding the Government's right to maintain an action to review the Commission's order denying reparations, pointed out that even if "the allowances exacted from the Government were authorized in the railroads' published tariffs," they may nevertheless be "unlawful" if "unreasonable." *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, 437–438; cf. 198 F. 2d at 964–965, 972.

Thus, the district court's conclusion that the tariffs in the two cases are "materially different" has no bearing on the question whether, apart from the tariffs, the railroads were guilty of discrimination and unreasonable practices in violation of the Interstate Commerce Act. Insofar as the facts relate to the latter issues, there are, as Judge Bazelon correctly stated, no "substantial differences" between the two cases. And the result reached by the three-judge district court sitting in the District of Columbia in the instant (or second) case is irreconcilable with principles de-

clared by the Court of Appeals for the District of Columbia in the first case—a conflict dramatically emphasized by the role of Circuit Judge Bazelon in the two cases.[7]

If the tariffs had provided separate charges for wharfage and handling, the carriers plainly could not have collected the charges and then refused either to perform the service or to make a refund therefor. The result should not be different because the rail roads, at their request, were permitted to use non-segregated tariffs which included the services but did not state separate charges therefor (see *supra,* note 1). The simple fact is that the Government has been required to pay twice for the service: once to the carrier (who did not perform it) as part of the line-haul rate, and a second time to the terminal company. To permit the carriers thus to impose a double charge on the Government, while at the same time permitting commercial shippers to obtain the identical services for the single charge, is the essence of the discrimination which Section 2 of the Act prohibits, and is unreasonable in violation of Sections 1 and 3.

In sanctioning the railroads' refusal to pay for wharfage and handling on the Army piers in Norfolk, the Commission and the district court

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[7] This intra-circuit disagreement is of special significance since it would appear that all suits by the United States seeking review of Commission reparation orders must be brought in the Diserict of Columbia. See 28 U. S. C. 1398.

have applied the Interstate Commerce Act in a way that seriously reduces the protection which that act was designed to give shippers against discriminatory practices. The prohibition against discrimination means that shippers situated alike are to be treated alike; yet here the Government receives less favorable treatment than private shippers operating under similar transportation conditions. The problem of discrimination between services which the railroads provide for military freight and for commercial freight has now arisen twice in the port of Norfolk and in at least one other port,[8] and it can occur wherever the military establishment has its own piers.

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[8] In *United States* v. *Aberdeen & Rockfish Railroad Co.*, 266 I. C. C. 45, 293 I. C. C. 219, rehearing denied December 20, 1954, the Commission dismissed a complaint by the United States seeking reparations from railroads serving the port of New Orleans for wharfage charges which the railroads paid on commercial freight but refused to pay on freight moving over Army operated wharves. The Government is seeking judicial review in that case, now pending in the District Court for the District of Columbia. The total amount of wharfage and handling charges involved in the two Norfolk cases and the New Orleans case runs to several million dollars.

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CONCLUSION

The question presented by this appeal is substantial and is of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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OCTOBER 1955.